REMARKS/ARGUMENTS

Responsive to the Official Action dated February 7, 2005, Claims 1 thru 8 have been rejected under 35 U.S.C. 103(a) as obvious over published U.S. Patent Application 2003/0220891(Fish). This is the sole basis of rejection of the claims currently now in this application. Section 103(a) states, in pertinent part:

> "A patent may not be obtained if the invention is identically disclosed or described as forth in Section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." [Emphasis added.]

Accordingly, Section 103(a) speaks to obviousness "at the time the invention was made." Therefore, accepting, *in arguendo*, the Examiner's argument of Page 4, ¶3 of said Official Action that:

"This instant CIP application substantially contains new matter added into the specification." Such new matter would nonetheless bear an effective filing date of August 22, 2001, and prior art under Section 103 which might speak to obviousness must reflect an effective date prior to August 22, 2001. Applicant notes that the reference to Fish is a published application, not a patent. Accordingly, its effective date is its date of publication, namely, November 27, 2003, that is, more than two years subsequent to Applicant's filing date. The specification of Fish could not have been known to ordinary skill in the art on August 22, 2001, since it was not published until 2003. This situation is similar to that of 35 U.S.C. 102(e)(1) in which an application for patent, published under Section 122(b), by another in the United States, can only constitute a reference if it was published before the date of invention by the Applicant, although in a rejection under 102(a), the existence of an invention known or used by

others in the United States before the invention by the application be relevant without regard to publication. Thusly, in a rejection under 102(a), which is not the present situation, Fish would have constituted evidence of invention prior to Applicant's effective date of August 22, 2001. However, given that the instant rejection is one under §103, the effective date for §103 purposes relates to the date of knowledge of one of ordinary skill in the art at that time. As above noted, one of ordinary skill in the art in August, 2001 would not have known that an unpublished PCT Application had been filed by Fish in December, 2000. Accordingly, Fish cannot constitute a proper reference for §103 purposes. In light thereof, the Examiner is urged to withdraw the rejection of record and pass this application to Allowance.

Respectfully submitted,
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